Neutral Citation no [2006] NICA 1 | *Ref:* **KERF5476**

Judgment: approved by the Court for handing down | *Delivered:* **27.01.2006**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

X

Before Kerr LCJ, Higgins J, Weir J

KERR LCJ

Introduction

[1] This is an application by X for leave to appeal against his conviction of three offences of indecent assault and two offences of rape. The applicant was convicted after a trial before Her Honour Judge Kennedy and a jury at Ballymena Crown Court on 30 January 2004.

[2] A number of different grounds of appeal have been advanced on behalf of the applicant. Mr Ferriss QC, who appeared for him on trial and before this court, helpfully grouped them into four main categories. The first of these involved two related submissions that the verdicts were against the weight of the evidence and that the learned trial judge should have withdrawn the case from the jury. The second category of arguments dealt with the avowed inconsistency of certain verdicts of the jury. The third category concerned the alleged failure of the learned trial judge to give a sufficiently clear warning to the jury about the need for caution in their approach to evidence of some of the witnesses; and the final category related to what was described as "the danger that the jury felt pressurised" by remarks made by the judge after an exchange with the foreman of the jury about the prospect of the jury reaching a unanimous verdict.

The factual background

[3] The applicant was born on 6 February 1967 and was married in 1988 to Y. She has three sisters, A, B and C. C was the principal complainant. Her date of birth is 3 December 1983. D is the daughter of A. D was the second complainant. Her date of birth is 7 May 1989.

[4] The series of events on which the charges against the applicant were based began on 8 August 1998. The applicant was charged on the first count with indecent assault of C on that day. The assault was alleged to have taken place at the applicant's home in Newtownards, County Down on the occasion of a family gathering after a christening. The complainant claimed that she had gone to sleep on a couch in the house, wearing only a T shirt over her underwear. While she was asleep the applicant came into the room and kissed C and fondled her breasts. She claimed that he also inserted his finger in her vagina. He has at all times admitted that he had kissed C and fondled her breasts but denied having digitally penetrated her. He was convicted of indecent assault in relation to this incident.

[5] The second count concerned an incident at a party on Boxing Day 1999, some seventeen months later. This again occurred at the applicant's home but by that time they had moved to Coleraine, County Antrim. During the evening C and the applicant met at the doorway of the bathroom as she was leaving it. C alleged that he pushed her back into the bathroom and kissed her in an indecent way and that he forced himself upon her, pushing her against the wall. The applicant accepted that he had kissed C but said it was just a fleeting Christmas kiss. He was convicted of indecent assault.

[6] The third count of indecent assault again involved an incident at the applicant's house. This was alleged to have occurred on New Year's Eve 1999. C gave evidence that she had been standing in the living room waiting for a taxi when the applicant entered, approached her from behind, put his arms around her waist and began to kiss her neck. He denied that he had done this. He was acquitted on this charge.

[7] The fourth count of indecent assault on C was alleged to have occurred in April 2002, shortly after the death of her father. She was in a living room, lying on a sofa. She alleged that the applicant came in and fondled her breasts. He denied having done this and he was found not guilty.

[8] The applicant was charged with two counts of rape of C. These offences are alleged to have occurred sometime between 17 April 2002 and 9 August 2002. It appears to be common case that during this period, C frequently stayed overnight at the applicant's home. She alleged that on two occasions the applicant had come into the spare room where she was sleeping and had sexual intercourse with her, against her will and despite her protests.

The applicant denied that he had sexual relations with C against her will; he claimed that on two occasions there had been consensual sexual activity between him and C. On the first of these he had not been able to maintain an erection and full sexual intercourse had not occurred. On the second occasion intercourse took place. The applicant was found guilty by majority verdict in both instances.

[9] The final two counts were of indecent assault of D, the daughter ofA. These were alleged to have occurred within a short time of each other on the evening of 10 August 2002. Again this was on the occasion of a party. In this instance the party took place at A's house. In relation to the first of these incidents the applicant was alleged to have touched D's breast when they were in the utility room of the house. The applicant denied that charge and he was acquitted. In the second incident D alleged that the applicant had come to her and told her that he had been asked by her mother to put her to bed. He then took her to her bedroom where, according to her, he kissed her and attempted to take down her trousers. The applicant denied the charge. He said that his youngest child (who was then a baby) had been put to bed on the floor of D's room but she would not settle and he was urging D to leave the room so that the baby would go to sleep. A's husband,E, came into the room because of what had been overheard from a baby monitor in the room and there was a physical encounter between the two men. The applicant was convicted of the offence of indecent assault in respect of that incident.

The arguments about the weight of the evidence

[10] Mr Ferriss acknowledged immediately that the arguments made under this rubric were not the most compelling. He drew our attention, however, to the fact that at the time that the rapes were alleged to have occurred C's home was a short distance away. Despite this, as she agreed under cross examination, she spent most nights at the applicant's house. Y said in evidence that C stayed in her house except for the "occasional night". Furthermore, C agreed that she had accepted physical comfort from the applicant after the death of her father. This took the form of his stroking her hair and placing his hand on her shoulder. These were done in the presence of Y. Y said thatC hugged the applicant on occasions and that she had suspicions that they might be having sexual relations. They also had secret chats and C confided in the applicant a lot. She was relaxed walking about the house in a T shirt and pants. All of this, Mr Ferriss claimed, was inconsistent with her having been the victim of sexual attack by the applicant.

[11] On the occasion of the second rape the applicant was alleged byC to have washed the sheets of the bed in which intercourse had taken place. Y gave evidence thatC had told her that she had been sick in the bed. This was the excuse which C said the applicant had told her to make. Why, Mr Ferriss

asked, would C espouse this false story unless she was a consenting partner in the sexual activity?

[12] Mr Ferriss also drew our attention to the fact that C had told the police that it was April or May that she had been raped. Despite this, she had continued to live with the applicant and his wife. She could have lived with her mother or one of her other sisters. Her mother lived within five minutes' walk of the applicant's house. Two other sisters lived nearby. Mr Ferriss suggested that this it was inherently unlikely that C would have continued to live in the applicant's household if she had been raped by the applicant.

[13] The second principal argument on this theme was based on the evidence of F. She had been a friend of C since she was fourteen years old. C had said that in relation to the first incident of indecent assault and on the occasion of the first alleged rape she had spoken to F about what had happened. F gave evidence about what C had told her of the first incident of indecent assault. According to her, C had said that she had woken to find the applicant kissing her. She did not complain that he had digitally penetrated her. In relation to the second account given, she said that C told her that she had wakened to find the applicant trying to have sex with her. F gave evidence that she had advised C not to go down to the applicant's house again. Despite this, it is clear that C continued to live with the applicant and his wife.

[14] Mr Ferriss drew a contrast between the account that C had given about her telephone calls with F and that given by F herself. C claimed than she had told F that the applicant had "fingered" her in Newtownards, whereas F had said that C had merely complained that the applicant had been kissing her. In relation to the first rape C said that she had told F about it a couple of days after it occurred. She said that she had told F that she woke up to find the applicant having sex with her and that she told F that she had been raped. By contrast F had said that C's account was that he was *trying* to have sex with her.

[15] Mr Ferriss claimed that at all times the applicant's account in relation to both incidents was more consistent with what F had said than was C's version. He had described the incident in Newtownards when he kissed C and felt her breasts but that nothing more had happened. In relation to the first alleged rape he said that they had tried to have sexual intercourse on the first occasion but that it did not happen. This tallied exactly with what F had said she had been told by C, Mr Ferriss suggested.

[16] Finally, on this issue Mr Ferriss pointed out that the first occasion on which C told anyone other than F of the alleged rape was some days after the barbecue when there had been general family concern about what had happened between the applicant and D. There was an obvious motive,

therefore, for her to fabricate the accounts of rape because of what was likely to emerge as to the consensual relationship between the applicant and C. She had, Mr Ferriss claimed, a clear incentive to lie about the nature of that relationship.

[17] Mr Ferriss made allied submissions on what we might describe as the evidential argument. First he said that the trial judge should have acceded to the application for a direction at the end of the Crown case by applying what is commonly called the second limb of the *Galbraith* case (*R v Galbraith* [[1981] 2 All ER 1060). Secondly, in light of the anomalies that he claimed were present in the evidence, he suggested that this court could not be satisfied of the safety of the verdict on any of the charges.

The application for a direction

[18] The 'second limb of *Galbraith*' is the shorthand expression commonly used to describe the principle that a judge should withdraw the case from the jury where he or she comes to the conclusion that the prosecution evidence, taken at its highest, is such that a properly directed jury could not properly convict on it. The Court of Appeal in *Galbraith* was careful to confine the principle in this way and warned that, where there was evidence whose reliability fell to be assessed by the jury, it would not be right to stop the case, whatever view the judge had formed of it. At page 1062, Lord Lane CJ said: -

> "Where however the Crown's evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there *is* evidence on which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury."

[19] In the field of forced sexual contact by one person on another who is known to him, the range of reactions of the person on whom the unwanted sexual attention is pressed is infinitely variable. It would be imprudent to assume that because a claimed victim of sexual attack does not escape from a situation where that attack has taken place, her account is to be disbelieved. Likewise, the fact that the person who has been sexually attacked behaves in a normal fashion towards her assailant does not necessarily belie her account. The significance of post attack conduct on the credibility of the account by the person who claims to be a victim is pre-eminently one for a jury to assess. We are satisfied that the judge was right to refuse the application for a direction of no case to answer.

[20] In relation to the claim that C had given an account to F that was inconsistent with the version that she gave in evidence, we bear in mind that the circumstances in which C told F what happened were fraught. That she would not necessarily wish to impart all that had occurred is not surprising. The fact that the accounts do not tally is again unsurprising. C was staying in her sister's home. Her brother in law had, according to her, forced uninvited sexual approaches on her on two occasions. It is not in the least unusual that she should give incomplete accounts to her best friend about what had happened. Moreover, both C and F were giving evidence about incidents that had happened some significant time previously. In the case of the indecent assault this had happened some six years before the trial and in the case of the rape almost two years previously. That C should be less than clear about what she had told F does not necessarily render her account less than credible.

[21] Mr Ferriss's claim that the applicant's version in relation to both incidents was more consistent with what F had said than was C's evidence cannot be accepted in light of the single most important aspect of both accounts. That was that the sexual attentions of the applicant were unwelcome and forced on C. F's statement as to what C had told her on this part of the story was unequivocal. C had not wanted nor agreed to the sexual activity that the applicant had initiated. On this critical point, F's evidence provided crucial contemporaneous corroboration of C's unwillingness to participate in sexual relations with the applicant. We do not believe, therefore, that such differences as existed between the accounts of F and C render this a case which should have been withdrawn from the jury.

Was the verdict against the weight of the evidence or was it unsafe?

[22] In light of our conclusion that the judge was right not to accede to the application for a direction the argument that the verdict was against the weight of the evidence must fail. The basis on which the trial was allowed to proceed was that there was sufficient evidence on which the jury could properly convict. It follows that the verdict could not be said to be against the weight of the evidence. This does not, however, necessarily dispose of the argument that the verdict cannot be regarded as safe. A jury could properly convict on the basis of the evidence presented to it but the Court of Appeal might subsequently conclude that it entertained a doubt about the safety of the conviction, either because of facts that emerged subsequently or because of a different analysis of the evidence given at trial.

[23] In *R v Pollock* [2004] NICA 34 this court considered the proper approach to be taken to an argument that a jury's verdict was unsafe. At paragraph [32] we set out the following principles: -

1. The Court of Appeal should concentrate on the single and simple question 'does it think that the verdict is unsafe'.
2. This exercise does not involve trying the case again. Rather it requires the court, where conviction has followed trial and no fresh evidence has been introduced on the appeal, to examine the evidence given at trial and to gauge the safety of the verdict against that background.
3. The court should eschew speculation as to what may have influenced the jury to its verdict.
4. The Court of Appeal must be persuaded that the verdict is unsafe but if, having considered the evidence, the court has a significant sense of unease about the correctness of the verdict based on a reasoned analysis of the evidence, it should allow the appeal."

[24] We have applied those principles to the present case. We do not consider that there is any reason to feel a sense of unease about the verdict. The scrupulous and thorough analysis of the evidence by Mr Ferriss does not leave us with any doubt about the safety of the verdict.

The claimed inconsistency of the verdicts

[25] Mr Ferriss submitted that the verdicts of the jury acquitting the applicant of two offences of indecent assault on C were inconsistent with their verdicts on the charges of rape. He suggested that the only logical conclusion was that the jury had disbelieved C's account of the two indecent assaults in respect of which the applicant was acquitted. He submitted that unless a logical chain of reasoning could be demonstrated whereby the verdicts could be explained, the convictions for rape must be quashed.

[26] We do not accept these submissions. The law in relation to inconsistent verdicts was considered by the Court of Appeal in England in *R v G* [1998] Crim LR 483. In that case Buxton LJ cited with approval the following passage from the case of *Clarke and Fletcher*, where Hutchison LJ said: -

> "We approach the present case on the basis that it is for the appellant to show (1) that the verdicts are logically inconsistent and (2) that they cannot be sensibly explained in a way which means that the conviction is not unsafe. Thus an appellate court will not conclude that the verdict of guilty is unsafe if, notwithstanding that it is logically inconsistent with another verdict, it is possible to postulate a legitimate train of reasoning which could sensibly account for the inconsistency."

[27] Buxton LJ also referred to the case of *Bell* in which Rose LJ said: -

> "There have recently been a number of appeals to this court based on allegedly inconsistent verdicts, and it is perhaps therefore worth emphasising that it is axiomatic that, generally speaking, logical inconsistency is an essential prerequisite for success on this ground: see *Durante* 56 Cr App Rep 708.
>
> … there are, of course, exceptional cases, of which *Cilgram* [1994] Crim LR 861 provides an example, where a verdict may be quashed because, although there is no logical inconsistency, the particular facts and circumstances of the case render the verdict unsafe. However, it is to be noted that in *Cilgram* this Court, differently constituted, expressly rejected the submission that, where a complainant's credibility is in issue and her evidence is uncorroborated, guilty verdicts must be regarded as unsafe because the jury also returned not guilty verdicts in relation to some of the complainant's allegations."

[28] Commending this analysis, Buxton LJ continued: -

> "As it seems to us, and as it seemed to the court in *Bell*, it does not follow that verdicts are logically inconsistent just because they all depended on the evidence of the same person. A person's credibility, any more than their reliability, is not necessarily a seamless robe. The jury has to consider, as the jury in this case was rightly told, each count separately. It may well take a different view of the evidence as to its reliability in one case rather than the other. Further, it is in our view too simplistic to make the stark distinction between credibility and reliability that was sought to be made in the argument before us. What the jury has to decide is whether on all the matters put before it it is satisfied so that it is sure of the particular matter that was alleged under each count.
>
> …
>
> In our judgment it does not follow as a matter of logic, any more than in the judgment of the court in *Bell* it followed as a matter of logic, that, even where credibility is in issue and evidence is uncorroborated, guilty verdicts must be regarded as unsafe because

> the jury also returned not guilty verdicts in relation to some of the complainant's allegations."

[29] In the recent case of *R v M* CA (Crim Div) 6/12/2005 a similar argument was made to that presented by Mr Ferriss in this case. M had appealed against convictions for indecent assault, two counts of indecency with a child and rape. He had been acquitted of two further counts of indecent assault and had argued that the verdicts were logically inconsistent since all the offences related to the same course of conduct. The Court of Appeal held that the verdicts were not logically inconsistent. It was perfectly possible for the jury to accept the complainant's evidence on some counts and reject or be unsure about her evidence on others. Such a course was open to a rational jury.

[30] Even if it was the case that the jury in the present case had rejected C's evidence in relation to the two charges of which the applicant was acquitted, this does not demonstrate a logical inconsistency in the verdicts. On the contrary, this can be explained on the basis that the jury did not accept that the evidence presented on those charges was sufficient to establish his guilt. Although that process of reasoning may have involved rejection of C's evidence, either on the ground that it was not reliable or that it was simply not credible, this is not a basis on which it can be said that there was a logical inconsistency between the verdicts. The jury was bound to consider each of the charges separately and to evaluate the evidence in relation to each – see *R v Christou* [1997] AC 117, *R v Cannan* (1991) 92 Cr App R 16 and *R v Flack* [1969] 2 All ER 784 and in this jurisdiction *R v Drake* [2002] NJICA 6. That it found the charges proven in relation to some of the counts but not proven in other instances does not, without more, demonstrate that there has been a logical inconsistency. There is nothing *illogical* about the jury accepting and believing C's evidence on some counts but not accepting or even disbelieving her evidence in relation to others.

The need for a warning

[31] Mr Ferriss accepted that the learned judge enjoyed a wide discretion whether to give a warning to the jury as to the need for caution in convicting on the uncorroborated evidence of the complainants. He claimed, however, that the judge had decided that this was necessary but that she had failed to convey a sufficiently effective warning. If a warning is to be given it was incumbent on the judge, Mr Ferriss claimed, to explain why a warning was necessary and to identify the evidence that is capable of giving support to the complainants' version.

[32] In *R v Makanjuola* [1995] 1 WLR 1348 the Court of Appeal in England considered the effect of section 32 (1) of the Criminal Justice and Public Order Act 1994 (which abrogated the mandatory requirement to warn the jury about

convicting on the uncorroborated evidence of the complainant of a sexual offence). The court held that it was a matter for the judge's discretion as to what, if any, warning was necessary about the need for corroboration of a complainant's evidence in a sexual offence case. Whether he chooses to give a warning and in what terms will depend on the circumstances of the case, the issues raised and the content and quality of the witness's evidence. Lord Taylor CJ expressly stated that court should be disinclined to interfere with a trial judge's exercise of his discretion save in a case where that exercise is unreasonable in the *Wednesbury* sense: *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223.

[33] The first issue to be addressed in the present case is whether the learned judge concluded that a warning was necessary. Mr Ferriss relied on the following passages from her charge in support of the claim that she had done so: -

> "Corroboration is not now required in sexual offences. Corroboration is independent evidence which does not come from the complainants in this case, from C or D. It is evidence which confirms in some important respect, not only the evidence that the crime has been committed, but also that the defendant committed it. I say confirms in some important respect, but it is not necessary that there should be independent evidence of everything C and D have told you. It is for me to point out to you the evidence which, if you accept it, is capable of independently confirming C or D's evidence. I shall do that later when I'm looking at the evidence in detail.
>
> …
>
> However, it is for you to decide whether any of that evidence does, in fact, provide independent confirmation of C or D's evidence. If you are doubtful about a particular part of their evidence, you can look to see whether it fits in with other statements or circumstances relating to a particular matter. The better it fits in, the more you may be inclined to believe it. The doubted statement is corroborated to a greater or lesser extent by other statements or circumstances with which it fits in. What C and D told their friends and mothers is not corroboration, and I will explain to you what approach you should adopt to that."

[34] Although the judge dealt in these passages with what constituted corroboration, she did not at any time urge caution on the jury about convicting if they found that there was no corroboration. The absence of that direction can only be consistent with the judge's conclusion that a warning was not required. But such a conclusion does not make corroboration, if it exists, irrelevant. Even if a warning is not required, if corroboration is present, although not required as a matter of law, it may well influence the jury to a view as to the credibility of the witness. There is nothing untoward, therefore, in the judge giving directions to the jury on the subject.

[35] Mr Ferriss argued, however, that, if the judge decided that a warning was not necessary, she was wrong to have done so. We do not accept that argument. We agree with the observations of the court in *Makanjuola*. The discretion available to the judge at trial as to whether a warning is required is necessarily a wide one. The judge is best placed to assess whether the flow of the evidence, the firmness of the complainant's testimony, the quality of the defence proffered and a myriad of other aspects of the trial dictate the need for a warning. This court should be slow to interfere with the exercise of that judgment, based as it must be not only on an analysis of the evidence but also on an impression of how witnesses have acquitted themselves under cross examination and challenge to their accounts.

[36] As a subsidiary point to this general theme, Mr Ferriss submitted that the judge failed to point out to the jury the inconsistencies that could be detected between the evidence of F and that of C. In support of this claim he relied on *R v B* (2000) Crim LR 181 and *Spooner v R* [2004] EWCA Crim 1320. This submission was based on the proposition that the judge was bound to give a *Makanjuola* warning and for the reasons that we have given, we do not accept the validity of that claim. The submission must be rejected, however, for the further reason that the judge in fact did deal with the inconsistencies in the evidence of the two witnesses. Her charge to the jury includes the following passage: -

> "You have heard evidence that the day after C returned home from R's christening in 1998, she spoke to her friend F on the phone about the incident on the sofa. She said that the applicant kissed her and F said she sounded upset. Her mother, as a result, became aware that something was wrong and when she enquiredC told her that the accused had kissed her. The accused mentioned in his interviews that the mother confronted him with that later on. You've also heard evidence that C told F that when she was staying in the applicant's house she woke up to find him trying to have sex with her. Her voice was

> shaky. This was the first of the two incidents and ties in with the accused's account that the first incident of rape was not successful."

The danger of the jury feeling pressured

[37] The jury was sent out at 11.55am initially. They returned at approximately 3pm and gave verdicts of guilty on counts 1, 2 and 8 (all charging the applicant with indecent assault, two against C and one against D). At that stage no verdicts in relation to the other counts had been reached. The judge then gave a majority verdict direction. At approximately 4.20pm the jury were brought back and gave verdicts of not guilty by majority on counts 3, 4 and 7. There were no agreed verdicts on counts 5 and 6 (charging the applicant with the rape of C). The judge asked whether there was any prospect of reaching agreement. The foreman replied "I don't know". Other members of the jury also said something at this time but counsel were unable to hear what was said by them. Mr Ferriss claimed that at that stage the judge said, "Well, it looks as though you might." She then went on, according to Mr Ferriss, "We will send you out for another half hour and see if you can come to a verdict". The jury was then sent out at approximately 4.25pm and at approximately 4.55pm they returned with verdicts of guilty on the two rape charges by a majority of ten to two.

[38] Mr Ferriss argued that the words uttered by the judge might well have created the impression that the jury had to reach a verdict within thirty minutes and felt under pressure to do so. In support of this claim he referred us to the cases of *R v Rose* [1982] 2 All ER 536, *De Four v State* [1999] 1 WLR 1731 and *R v Duffin* [2003] EWCA Crim 3064. He suggested that the *De Four* case in particular bore significant similarity to the present case in that the judge in that case had asked the foreman if they would be able to reach a verdict if given more time. The foreman said that they would. The judge gave them an additional 30 minutes. Within 20 minutes the jury had returned a guilty verdict. The significant distinction between that case and the present, however, is that the Privy Council found that the reference to the period of thirty minutes was in fact the *imposition of a time limit*. In other words, the jury was given to understand that they had that period within which to reach a verdict. Likewise in *Rose* and *Duffin* there was reason to suppose that the jury felt under pressure to reach a verdict.

[39] The overriding principle is that no pressure may be exerted on a jury to return a verdict. As Lord Lane said in *R v Watson* [1988] QB 690:-

> "One starts from the proposition that a jury must be free to deliberate without any form of pressure being imposed upon them, whether by way of promise or of threat or otherwise. They must not be made to feel

> that it is incumbent upon them to express agreement with a view they do not truly hold simply because it might be inconvenient or tiresome or expensive for the prosecution, the defendant, the victim or the public in general if they do not do so."

[40] We do not consider that the statements made by the learned judge to the jury on the question of the possibility of their reaching a verdict can reasonably be construed as placing any pressure on them. The judge's question to the jury about whether they felt that they could reach a verdict was unexceptionable. She suggested that the indications were that they might be able to reach a verdict. It seems likely that this was in reaction to whatever jury members other than the foreman had said. Be that as it may, it is clear to us that the jury would have understood that the judge had accepted that it was possible that they would not reach a verdict. The proposal that they should consider their verdicts for a further half hour was to see if they could come to a verdict, not that they were required to do so.

Conclusions

[41] None of the grounds advanced on behalf of the applicant has been made out. The application for leave to appeal against conviction is dismissed.